

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1031

Cir. Ct. No. 2005TP58

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO ANGELA M. C.,
A PERSON UNDER THE AGE OF 18:**

BROWN COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

VIRJEAN L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
SUE E. BISCHER, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Virjean L. appeals an order denying her postjudgment motion for a new trial on the termination of her parental rights. Virjean argues: (1) evidence regarding a witness's past convictions was barred by WIS. STAT. § 906.09; (2) she was deprived of a fair trial by the admission of erroneous, irrelevant, and prejudicial information about the number of prior convictions of a key defense witness; (3) she should be given a new trial because the improperly admitted evidence so clouded a crucial issue that the real controversy was not fully tried; and (4) she received ineffective assistance of counsel. Because evidence of the number of the witnesses' convictions was not prejudicial and trial counsel's error did not affect the outcome of the proceeding, the order is affirmed.

BACKGROUND

¶2 On April 18, 2003, the court entered an order finding Virjean L.'s daughter a child in need of protection or services. The court ordered the child be placed in foster care. The court further ordered Virjean to comply with certain conditions for the return of her daughter. The conditions required Virjean to utilize a variety of services available in Brown County, maintain suitable housing, and obtain prior approval of the county department for another person to live with her. The County Department wanted the condition requiring prior approval of housemates placed on Virjean because she had a history of becoming involved with abusive, unsafe men.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Virjean L. stopped meeting these conditions in January 2005 when she moved from Green Bay to Pestigo. When Virjean moved, her social worker told Virjean that she should remain in Green Bay in order to complete her conditions. The social worker stated she was concerned that moving to a smaller community would make it more difficult for Virjean to access community resources. Later in 2005, Virjean moved in with her boyfriend, Randy T., without seeking the approval of the County Department. Another social worker discussed with Virjean the importance of returning to Green Bay, but Virjean stated she did not want to live alone. Virjean's social worker ordered Virjean not to allow contact between her daughter and Randy due to Randy's criminal record.

¶4 On September 16, 2005, Brown County filed a petition to terminate Virjean L.'s parental rights. At trial, Virjean's parenting instructor testified that Virjean would need constant support, on a daily basis, in order to parent her children. Two psychologists testified at the trial. One psychologist stated Virjean needed a structured, supervised setting to live successfully and was not capable of taking proper care of her children. Another psychologist testified that Virjean needed a significant amount of support in order to parent. Randy T. testified regarding his relationship with Virjean. The guardian ad litem asked Randy how many convictions he had and Randy replied fifteen to thirty, rather than the accurate number of four. After the trial, the jury found grounds for termination. On January 24, 2006, the court terminated her parental rights. On May 24, 2006, Virjean filed a postjudgment motion for a new trial. After a hearing, the court denied the motion.

DISCUSSION

Admission of Evidence Regarding Number of Past Convictions

¶5 We review a trial court’s “decision to admit or exclude evidence under an erroneous exercise of discretion standard.” *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. When the trial court does not provide reasoning for its evidentiary decision, the appellate court “independently reviews the record to determine whether the circuit court properly exercised its discretion.” *Id.*, ¶29. If evidence is erroneously admitted, “[t]he appellate court must conduct a harmless error analysis to determine whether the error ‘affected the substantial rights of the party.’” *Id.*, ¶30 (citation omitted).

¶6 Virjean L. argues the evidence regarding Randy T.’s prior convictions was barred by WIS. STAT. § 906.09,² because the trial court did not make a threshold determination regarding the admissibility of prior convictions. WISCONSIN STAT. § 906.09(3) provides, “[n]o question inquiring with respect to a conviction of a crime or an adjudication of delinquency ... shall be permitted until the judge determines pursuant to [WIS. STAT.] s. 901.04 whether the evidence should be excluded.”

¶7 Virjean L.’s reliance on WIS. STAT. § 906.09 is misplaced. There is no evidence in the record to suggest the trial court admitted the evidence of past convictions to impeach Randy T.’s credibility. In the guardian ad litem’s closing she stated “I asked Mr. [T.] the question on how many times he has been

² WISCONSIN STAT. § 906.09(1) provides in part, “[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible.”

convicted of a crime. ... It was that type of information that the Department relied upon when making the determination that he would not be a safe person in the home for [Virjean's child] to return to." Randy's credibility was never questioned. Rather, the record shows the evidence was used to illustrate why the Department of Social Services did not want Virjean's child to have contact with Randy.

¶8 Virjean L. further argues that even if the evidence was not admitted under WIS. STAT. § 906.09, she was deprived of a fair trial because the evidence was irrelevant and unduly prejudicial under WIS. STAT. §§ 904.02³ and 904.03.⁴ Virjean states if the court had weighed the relevance of the number of convictions against the prejudicial effect, the court would have found the evidence had minimal relevance.

¶9 In this case, the trial court admitted evidence of the number of convictions over defense counsel's objections. In response to defense counsel's objection, the court stated "I thought we had agreed that the question could be asked" However, the record shows that the pretrial stipulation referred to by the trial court covered Virjean L.'s convictions only and not Randy T.'s convictions. Therefore, because the trial court provided no reasoning for admitting the evidence, this court will independently review the record to

³ WISCONSIN STAT. § 904.02 provides, "[a]ll relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible."

⁴ WISCONSIN STAT. § 904.03 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"

determine whether the trial court erroneously admitted the evidence. *Martindale*, 246 Wis. 2d 67, ¶29.

¶10 In addition to the number of convictions, the trial court admitted evidence of the nature of Randy T.’s convictions. Specifically, the court admitted evidence showing Randy had a past conviction for domestic violence. The evidence of the nature of Randy’s convictions is sufficient to show why the Department of Social Services did not want Randy to have contact with the child. Indeed, at the postconviction motion hearing, the court stated “[w]hy the jury needed to know how many convictions there were, that wasn’t particularly relevant or material” This court agrees. While some evidence of Randy’s conviction record was necessary to this case, the exact number of convictions is not relevant.

¶11 However, admission of the number of convictions did not prejudice Virjean L.’s case and was therefore harmless error. *See Martindale*, 246 Wis. 2d 67, ¶30. Two social workers, two psychologists, and a parenting instructor all testified to Virjean’s inadequacies as a parent. The case focused on Virjean’s ability to parent. Randy T.’s testimony was not central to the case. The jury had more than sufficient evidence to reach its decision even without Randy’s testimony.

¶12 Virjean L. also argues this court should use its authority to reverse the judgment and grant a new trial in the interest of justice under WIS. STAT. § 751.06. Virjean argues she should be given a new trial because the improperly admitted evidence so clouded a crucial issue that the real controversy was not fully tried. For the reasons stated above, this court does not believe the improperly admitted evidence affected the outcome of the trial.

Ineffective Assistance of Counsel

¶13 Virjean L. argues, “the failure of defense counsel to inform himself as to the number of Randy T.’s prior convictions, to request a hearing to determine admissibility of those convictions, and to prepare Randy T. to testify as to the correct number of convictions, constituted deficient performance.”⁵ This court’s review of an ineffective assistance of counsel claim is a mixed question of fact and law. *See State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court’s findings of fact will not be disturbed unless they are clearly erroneous. *Id.* “However, the ultimate determination of whether the attorney’s performance falls below the constitutional minimum is a question of law which this court reviews independently” *Id.*

¶14 In order to succeed on her claim, Virjean L. must show both that counsel’s representation was deficient and that the deficiency prejudiced her. *See id.* Proof of either the deficiency or the prejudice prong presents a question of law this court reviews without deference. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). To prove deficient performance, Virjean must show that counsel’s specific acts or omissions were “outside the wide range of professionally competent assistance.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). To show prejudice, Virjean must demonstrate a reasonable probability that, but for the error, the outcome of the proceeding would have been different. *Id.* at 694.

⁵ The right to be represented in termination of parental rights proceedings includes the right to effective assistance of counsel. *In re M.D.S.*, 168 Wis. 2d 995, 1003-04, 485 N.W.2d 52 (1992).

¶15 As indicated, the parties stipulated that Virjean L. could be asked about the number of her previous convictions, however, neither party mentioned whether the question could be asked of Randy T. When asked at trial how many convictions he had, Randy testified “fifteen or thirty” when he really had only four convictions. Defense counsel objected to the question regarding the number of convictions after Randy started answering as to what type of convictions he had. Defense counsel failed to correct the trial court’s assertion, “I thought we had agreed that the question could be asked” Defense counsel testified he knew Randy had a prior record, but he did not know how many convictions, and he did not check a court data base to find this information. Defense counsel neither objected to the relevance of the question, nor corrected the inaccurate information for the jury. Neither of these acts were the result of reasonable professional judgment. See *Pitsch*, 124 Wis. 2d at 637. Therefore, Virjean meets the first prong of the *Strickland* test.

¶16 However, Virjean L. fails to show that but for counsel’s error the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. As stated above, multiple experts testified to Virjean’s inadequacies as a parent. The case focused on Virjean’s ability to parent. Randy T.’s testimony and his criminal record were not central to the case. There was more than sufficient evidence to allow the jury to reach its decision even without the evidence regarding Randy. Therefore, Virjean fails to meet the second prong of the *Strickland* test.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE §809.23(1)(b)4.

